CHOI KOK KHEONG v. PP

HIGH COURT SABAH AND SARAWAK, KOTA KINABALU
LIM HOCK LENG J
[CRIMINAL APPEAL NO: BKI-42JSK S-1-1-2024]
28 NOVEMBER 2024

Abstract – *When a charge mentions a specific date on which the offence under the charge is alleged to have been committed, it must be proven beyond reasonable doubt that the accused had indeed committed the offence on the said date. The courts, in convicting the accused under the charge, may not rely on evidence that the accused had, on other dates, committed a similar offence. That would render the conviction unsafe.*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Sexual Offences Against Children Act 2017, s. 14(a) – Charge at Sessions Court for committing sexual physical assault upon minor – Accused person convicted and sentenced – Whether decision ought to be disturbed – Whether commission of offence proved beyond reasonable doubt – Whether Sessions Court carried out balancing exercise*

CRIMINAL PROCEDURE: *Appeal – Additional evidence – Accused person convicted and sentenced for offence under s. 14(a) of Sexual Offences Against Children Act 2017 – Application by accused person to adduce instructions to previous counsel – Whether inconsistent with witness statement – Whether instructions were alibi – Whether evidence regarding alibi adduced during full trial – Whether alibi raised reasonable doubt towards prosecution's case*

At the Sessions Court, the appellant was charged under s. 14(a) of the Sexual Offences Against Children Act 2017 for the offence of committing, on 27 June 2021, sexual physical assault upon a minor, who was only seven years and ten months ('PW1') at the material time, by inserting his finger into her vagina ('charge'). The said offence was alleged to have taken place in the bedroom of PW1's mother ('PW4'), located in an unnumbered house ('house'), inhabited by the appellant, PW1, PW4, PW1's grandmother ('PW3') and sister ('sister'), who was not called as a witness. After a full trial, in which the appellant was represented by a different counsel ('previous counsel'), the Sessions Court sentenced the appellant to a six-year imprisonment with two whippings. The appellant was also ordered to undergo police supervision for three years after serving the sentence, and to attend rehabilitative counselling while being imprisoned. In finding the appellant guilty, the Sessions Court had relied on, among others, the testimonies of PW3 and PW4. According to PW3, PW1 had told her that the appellant had conducted various sexual misconduct against her. As told

by PW1, on numerous unspecified dates, the appellant had, *inter alia*: (i) tried to insert his genital into PW1's vagina, but because it was unfit, he inserted his finger instead; (ii) invited PW1 to watch pornography and then asked PW1 to touch his genital; (iii) asked PW1 to watch him taking a bath; and (iv) asked PW1 to conduct a fellatio on his genital ('various sexual misconduct'). Other than that, PW3 and PW4 testified that on the night of 27 June 2021, while PW3 together with her family members were gambling in the living room of the house, she saw PW1 running away from PW4's bedroom hastily while ignoring the call of others. When PW4 came to her bedroom, she saw the appellant on the bed playing with his mobile phone while being tucked in a blanket. After uplifting the blanket, PW4 saw the appellant's genital was erected. On the next day, PW4 saw PW1's underwear lying on the floor of the bedroom. As to how the prosecution witnesses knew the date of the incident, PW4 contended that the said date was from the date of the CCTV recording of the incident. Dissatisfied with the outcome of the trial, the appellant filed this appeal against the Sessions Court's decision. In this appeal, pursuant to a filing of a notice of motion, the appellant sought to adduce further or additional evidence of his instructions to previous counsel which were inconsistent with his witness statement ('DWS1') ('application'). As posited by the appellant, there was a flagrant incompetence on the part of his previous counsel for failing to put across his case that: (i) from morning till about 3.30pm on 27 June 2021, the appellant was at a training centre and he could not recall the time he returned to the house on that date; (ii) upon his return, the appellant and PW4 attended to their dog which was about to give birth. It was averred that the appellant was with PW4 from night until morning of the next day, and the appellant was the one who had cut the dog's umbilical cord; (iii) the appellant objected to the allegation that he had committed the various sexual misconduct; and (iv) the appellant objected to the allegation that he had inserted his finger into PW1's vagina. According to the appellant, the flagrant incompetence by the previous counsel had violated his constitutional right to a fair trial and that had rendered his conviction unsafe. Whereas for the appeal proper, the appellant raised the main issue of whether it was proven beyond reasonable doubt that he had inserted his finger into PW1's vagina on 27 June 2021.

Held (allowing appeal):

(1) The appellant's application, to adduce further and additional evidence of his instructions which were inconsistent with his witness statement, was unmeritorious. There were instructions from the appellant to his previous counsel which emerged from time to time at the trial. There were various occasions on which the appellant's instructions were mentioned or raised during the trial. Therefore, it could not be said that the previous counsel had not carried out the appellant's instructions and

was flagrantly incompetent merely because he did not directly or expressly put it to the prosecution witnesses that the appellant had not inserted his finger into PW1's vagina. (paras 19-22)

(2) The appellant did adduce evidence of where and what he was doing on 27 June 2021, by tendering his diary. The purpose of that diary was to show that the appellant could not have committed the alleged act of inserting his finger into PW1's vagina at the material time stated in the charge, since he was elsewhere. It was noted by the Sessions Court that although the appellant said he was not at home on 27 June 2021 from 3.30pm until late evening, the appellant had confirmed that he had gone back to the house that night. While the appellant said he could not recall when he got back, and that he was with PW4 'at all times from 27th night to the 28th morning,' as he was attending the birth of puppies from midnight onwards, the Sessions Court had accepted the evidence of PW4 who denied the appellant's narrative. The Sessions Court had not treated the appellant's alibi as inadmissible, but found that the alibi did not raise any reasonable doubt. The appellant therefore could not be said to have been deprived of a fair trial through the alleged flagrant incompetence of the previous counsel. (paras 31-32 & 35-36)

(3) The balancing exercise which must be carried out to ascertain whether the probative value outweighed the prejudicial value had not been undertaken in the Sessions Court. A *fortiori*, the prejudice accruing to the appellant here was stronger as the CCTV recording which PW4 relied upon to give a date of the commission of the offence was not properly investigated by the investigating officer ('PW5') as there was no evidence he had even viewed it. Further, the CCTV recording itself was not produced at the trial. Thus, although PW5 had gathered statements from the other prosecution witnesses, obtained the medical and examination reports from the doctor, visited the scene of the incident and made a sketch plan and so on, PW5 had not investigated the alleged CCTV recording or secure its copy for the trial. Nonetheless, even if the CCTV recording was produced and it showed PW1 had run out from PW4's bedroom on 27 June 2021, and her underwear (which did not have any bloodstain) was found on the floor the next day, that did not mean that the appellant had inserted his finger into PW1's vagina. (paras 65, 69-70 & 72)

(4) The infirmities of the case fell squarely within those categories mentioned in *Mohd Yusri Mangsor & Anor v. PP*. The Sessions Court had allowed the evidence of the various sexual misconduct to be commingled with the specific act set out in the charge, without carrying out the requisite balancing exercise of evaluating whether the evidence of similar and other acts of a sexual nature ought to be admitted by

considering the probative value against the prejudicial aspects. There was also the incomplete investigation by PW5 which assumed greater significance, when one considered that PW3 and PW4's testimonies originated from PW1 who did not know the date when the alleged offence was said to have been committed. Ultimately, there were gaps in the prosecution's case which were not filled. Evidence of the specific act on the date in question was found to be wanting and could not be linked to the specific date in the charge. At the hearing of this appeal, the prosecution, when asked whether they could identify any evidence which could show the appellant had engaged in the act of inserting his finger into PW1's vagina on 27 June 2021, acknowledged that there was no such evidence. The confluence of these factors meant that the conviction was unsafe. The appeal was hence allowed, and the conviction and sentence by the Sessions Court were set aside. The appellant was ordered to be acquitted and discharged from the charge. (paras 77 & 79-84)

Case(s) referred to:
Amran Senin v. PP [2013] CLJU 1504; [2013] 1 LNS 1504 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Goh Han Heng v. PP [2003] 4 SLR 374 ***(refd)***
Junaidi Abdullah v. PP [1993] 4 CLJ 201 SC ***(refd)***
Mohan Singh Lachman Singh v. PP [2002] 3 CLJ 293 CA ***(refd)***
Mohd Faiz Ismail v. PP [2022] CLJU 3146; [2022] 1 LNS 3146 HC ***(refd)***
Mohd Hanif Kassim v. PP And Another Appeal [2015] 3 CLJ 984 HC ***(dist)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Murugayah v. PP [2004] 2 CLJ 489 CA ***(refd)***
PP v. Wong Chee Beng [2016] CLJU 876; [2016] 1 LNS 876 HC ***(refd)***
Rahmani Ali Mohamad v. PP [2014] 7 CLJ 405 CA ***(refd)***
Shamim Reza Abdul Samad v. PP [2009] 6 CLJ 93 FC ***(refd)***
Yahya Hussein Mohsen Abdulrab v. PP [2021] 9 CLJ 414 FC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 402A
Sexual Offences against Children Act 2017, s. 14(a)

For the appellant/accused - Hamid Ismail; M/s Hamid & Co
For the respondent/prosecution - Lovely Natasha Charles; DPP

Reported by Syamim Ariffin

JUDGMENT

Lim Hock Leng J:

[1] In the charge framed under s. 14(a) of the Sexual Offences against Children Act 2017 ("SOACA"), the appellant was alleged to have, on 27 June 2021, in the bedroom of an unnumbered house at Kampung Kompipinan Dabak, Penampang, "memasukkan jari ke dalam kemaluan kanak-kanak berkenaan."

[2] The charge reads as follows:

> Bahawa kamu, pada 27/06/2021, bertempat di bilik tidur sebuah rumah yang tidak bernombor, Kampung Kompipinan Dabak di dalam daerah Penampang, di dalam negeri Sabah telah melakukan amang seksual fizikal terhadap kanak-kanak dengan menyentuh mana-mana bahagian badan seorang kanak-kanak iaitu xxx (No Mykad: xx-xx-xx) berumur 7 tahun 10 bulan dengan memasukkan jari ke dalam kemaluan kanak-kanak, oleh yang demikian kamu telah melakukan kesalahan dibawah Seksyen 14(a) Akta Kesalahan-Kesalahan Seksual Terhadap Kanak-Kanak 2017 (Akta 792) yang boleh dihukum di bawah Seksyen yang sama.

[3] After a full trial, the appellant was convicted of committing physical sexual assault on a child who was seven years and ten months of age ("PW1") at the time.

[4] The appellant, the 55-year-old boyfriend of PW1's mother, was sentenced to a term of imprisonment for six years, and ordered to be whipped twice. He was also ordered to be placed under police supervision for three years after serving sentence, and to undergo rehabilitative counselling while imprisoned.

[5] The prosecution called five witnesses to prove the essential elements of the charge:

(i) PW1 was a child;

(ii) the identity of the accused;

(iii) there must be physical sexual assault or contact on the child victim by the accused; and

(iv) that assault or contact must have been carried out with a sexual purpose or intent.

[6] The five witnesses were:

(i) the alleged victim (PW1);

(ii) a doctor from the Obstetrics and Gynaecology Unit at the Hospital Wanita dan Kanak-Kanak Likas (PW2);

(iii) PW1's grandmother (PW3);

(iv) PW1's mother (PW4);

(v) and the investigating officer (PW5).

[7] PW1's MyKid was marked as exh. P7, thus establishing her age at the time the offence was said to have been committed. Her age was not disputed.

[8] As for the accused's identity, he was identified by both PW1 and her mother, PW4, at the trial.

[9] At the trial, the appellant was represented by a different counsel.

[10] Aggrieved by the outcome of the trial, the appellant appealed to this court.

Notice Of Motion (Further Or Additional Evidence, And Supplementary Petition Of Appeal)

[11] For the purposes of the appeal, the appellant had engaged a different counsel who filed a notice of motion to adduce further or additional evidence, primarily on the basis of the previous counsel's flagrant incompetence.

[12] The appellant's application to adduce further or additional evidence was general and broad, as can be seen from the notice of motion and affidavit in support. It was, in substance, an attack on the previous counsel's flagrant incompetence.

[13] The application was disallowed, though the appellant was allowed to file a supplementary petition of appeal (to which the prosecution was amenable).

[14] The appellant felt that aggrieved his previous counsel did not put across his case that (i) from morning till about 3.30pm on 27 June 2021, he was at a training centre and he could not recall the time he had returned to PW4's house on that day; and (ii) when he arrived at PW4's house on that day, he and PW4 were attending to their dog which was about to give birth. In his affidavit in support, he averred that he was with PW4 from that night till the morning, and he was the one who had cut the umbilical cord.

[15] The appellant also took issue with his previous counsel's omission in objecting to other alleged acts of sexual misconduct on the victim on other dates which, it was argued, were prejudicial and inadmissible.

[16] The appellant averred/suggested that he could not have committed the offence with which he was charged on account of that narrative, and that he had given instructions to his previous counsel to deny that he had inserted his finger into PW1's vagina, which instructions were allegedly not followed.

[17] The appellant contended that the flagrant incompetence of his counsel violated his constitutional right to a fair trial, and rendered his conviction unsafe; see *Shamim Reza Abdul Samad v. PP* [2009] 6 CLJ 93 and *Yahya Hussein Mohsen Abdulrab v. PP* [2021] 9 CLJ 414.

[18] The appellant wanted to adduce further or additional evidence of his instructions, which are inconsistent with his witness statement, DWS-1.

[19] The appellant's application/contention is unmeritorious. There were instructions from Choi to his counsel, which emerged from time to time at the trial. For example, the appellant's erstwhile counsel mentioned his

client's instructions that the victim slept in her grandmother's bedroom and not her mother's bedroom. See NOP, p. 52, lines 10 to 11 and 30 to 32. As another example, see also NOP, p. 71, lines 32 to 34, when the appellant's counsel prefaced a cross-examination question for PW4 with the words: "According to my client, because he is more than 20 years older than you ..." He then proceeded to relate the appellant's version that the victim had always been sleeping with the grandmother PW3 while the victim's sister slept with their mother PW4. See NOP, p. 72, lines 6 to 9.

[20] It is also obvious that the appellant had told his counsel about PW4's dog breeding business, and the foundation was laid for the appellant's diary to be adduced if his defence were to be called, with the object of showing he was elsewhere at the material time. See NOP, p. 48.

[21] There were other indications that the appellant's instructions were ventilated at the trial. For example, see NOP, p. 74, as to PW4's jealousy and her installation of a device in the appellant's handphone so she could monitor his whereabouts.

[22] Bearing in mind the various occasions on which the appellant's instructions were mentioned or raised during the trial, I do not think it can be said that the defence counsel did not carry out instructions and was flagrantly incompetent merely because he did not directly or expressly put it to the prosecution witnesses that he did not insert his finger into the victim's vagina.

[23] Firstly, from a perusal of the NOP, it appears that the defence strategy was to rely on the contention that PW1 slept with her grandmother (PW3) and not her mother (PW4), who had separate bedrooms, and hence the act complained of in the charge could not have occurred in PW4's bedroom.

[24] Secondly, the other part of the trial defence was to broach PW4's dog breeding business during the prosecution's case and then – if the defence were to be called – give evidence that he was with PW4 on the night in question, helping with the birth of the puppies.

[25] In both instances, that was the defence's way of denying that the accused had inserted his finger in PW1's vagina on 27 June 2021.

[26] Moreover, the defence was entitled to rely on the principle that the legal burden is always on the prosecution to prove its case, and not for an accused to prove his innocence.

[27] Moving on, the appellant sought to disassociate himself from his witness statement by averring in his affidavit that after he had read the draft sent to him by WhatsApp, he had told his previous counsel that he wanted to amend it but the latter "told me I should just follow what he put inside the witness statement."

[28] The appellant's explanation is incredulous because he was asked at the trial if he had any amendments to be made before he signed the allegedly inconsistent witness statement, which was to be tendered and marked as DWS1. He had answered in the negative. The appellant's averment that he had to answer "no" because "I remembered what my previous counsel's advice that I just need to follow what he put inside the witness statement" defies belief, as he had sworn to tell the truth.

[29] The alleged instructions are not capable of belief, and are not evidence which could not be adduced at the trial.

[30] The threshold for the adduction of additional evidence, as propounded in *Murugayah v. PP* [2004] 2 CLJ 489, has not been met.

[31] In any event, the appellant did adduce evidence of where and what he was doing on the date in question, 27 June 2021, through the tendering of his diary, which was marked as exh. D1. The purpose of D1 was to show that the appellant could not have committed the alleged act of inserting his finger in PW1's vagina at the material time stated in the charge, since he was elsewhere. The omission to give notice of the alibi notice is not necessarily fatal. See s. 402A of the Criminal Procedure Code.

[32] The learned SCJ noted that although the appellant said he was not at home on 27 June 2021 from 3.30pm till late evening, the appellant had confirmed that he had gone back to the house that night. While the appellant said he could not recall when he got back, and that he was with PW4 "at all times from 27th night to the 28th morning," attending to the birth of the puppies from midnight onwards, the learned SCJ accepted the evidence of PW4, who denied the appellant's narrative.

[33] The learned SCJ found the victim/PW1 to be a competent witness whose evidence was corroborated by medical witness from PW2 of a tear in the victim's hymen.

[34] She further found that the victim had no motive to lie, and the appellant had failed to adduce sufficient evidence of any motive on the part of PW1 to lie. See *Goh Han Heng v. PP* [2003] 4 SLR 374, 382, para. 32, cited with approval in *Amran Senin v. PP* [2013] CLJU 1504; [2013] 1 LNS 1504; [2013] MLJU 1628.

[35] Notably, the learned SCJ did not treat the appellant's alibi as inadmissible but found it did not raise a reasonable doubt on account of the testimony of PW4 and the accused.

[36] The appellant could not be said to have been deprived of a fair trial through the alleged flagrant incompetence of his erstwhile counsel. He elected to give and did give evidence under oath, through his witness

statement DWS1, and had every opportunity to give further evidence about his alleged instructions under cross-examination and re-examination. The appellant also called DW2 and DW3 to testify on his behalf but to no avail.

Appeal Proper: Evidence Of Other Sexual Incidents And Incomplete/ Shoddy Investigations

[37] The main issue raised at the appeal proper was whether the appellant had inserted his finger into PW1's vagina in her mother's bedroom on 27 June 2021, as per the charge.

[38] It was common ground that the appellant stayed at PW4's house as they were involved in a romantic relationship, *albeit* a tempestuous one. According to PW3, the appellant stayed there from June 2020 to 29 June 2021. According to the appellant, he stayed there from June 2020 and left for good on 1 July 2021, after a quarrel with PW4.

[39] PW3 usually occupied one bedroom with PW1. PW3 had a partner who occasionally stayed over the weekend. On those occasions, PW1 would shift to PW4's bedroom. Otherwise, PW4, her other daughter, and the appellant typically slept in that bedroom.

[40] There were various incidents of sexual acts that the appellant was said to have perpetrated on PW1.

[41] These alleged acts came to light on 12 July 2021.

[42] On that day, PW1's sister told their grandmother (PW3) that her elder sister, PW1, had a big secret, that the appellant had been using her. It was thus PW3 asked PW1 directly what had happened. PW1 told her that she had a bad life, and enquired whether the appellant was coming back.

[43] According to PW3, when told that the appellant would not be coming back:

> Dia (PW1) menceritakan dia seringkali kena buat ada pernah satu kali si Choi insert dia punya kemaluan ke dalam kemaluan (PW1) tetapi it was unfit dia bilang. So si Choi guna jari dia untuk cucuk dia punya kemaluan. Choi juga ada ajak (PW1) tengok video lucah, And then si Choi suruh (PW1) tengok video itu dan ikut apa video itu buat until (PW1) bilang dia muntah. Choi suruh (PW1) pegang dia punya kemaluan tapi (PW1) tidak berdaya lalu si Choi buat sendiri sehingga ada macam susu keluar daripada kemaluan si Choi. Lalu dia buang di tandas (PW1) cakap. Adakalanya, Choi suruh (PW1) tengok si Choi waktu mandi and then si Choi angkat (PW1) di atas sinki lalu dia jilat (PW1) punya kemaluan. Ada satu hari, Choi suruh (PW1) pergi ke rumah saya dan disana dia buat begitu juga dia suruh (PW1) hisap dia punya kemaluan. Ada banyak kali juga dia buat memasukkan jari dia ke dalam kemaluan (PW1). And then (PW1) diberi amaran untuk tidak memberitahu sesiapa termasuklah mama dia. Itu sahaja.

PW3 told PW4 about these incidents that night.

[44] On 13 July 2021, the following morning, PW3 lodged a police report (exh. P6) at the Penampang IPD about these incidents.

[45] It will be recalled that the offence was alleged to have been committed on 27 June 2021 specifically, although the time was not specified.

[46] Since the appellant left the house for good, either in late June or on 1 July 2021, the incident would have happened in the first half of 2021. See NOP, pp. 13 to 14. Either way, that is not good enough as the charge specifically stated the date of the offence as 27 June 2021, especially since there was a variety of acts that were alleged to have been committed by the appellant on PW1 on different, unknown dates.

[47] The appellant was only required to defend the specific offence against him said to have been committed on 27 June 2021.

[48] It is clear that PW1 did not know the date that the appellant inserted his finger in her vagina. She said so at the trial. There was no eyewitness.

[49] PW3 and PW4's testimony on the date that the offence was allegedly committed must therefore be viewed with circumspection, as their evidence was based on what PW1 had told her sister (who was not called as a witness) and what she told her grandmother PW3.

[50] As PW4 testified: "Dia ceritakan kepada adik dia dan dia ceritakan kepada mama saya." See NOP, p. 58, lines 27 to 28.

[51] The learned SCJ's finding of guilt was based on PW3's testimony that the kejadian terakhir happened on 27 June 2021. Since PW1 did not know the date, how did PW3 know the date?

[52] This is what PW3 had to say:

> Pada malam hari itu, Choi dengan (PW1) di dalam bilik, kami sedang main judi dengan keluarga saya sendiri. Tiba-tiba (PW1) keluar dari bilik berlari dengan pantas sehingga tidak memperdulikan kami panggil. Pada malam itu, mama dia pergi ke dalam bilik tengok si Choi di dalam bilik. Dia sedang tengok handphone, Sekali anak saya buka selimut dia mendapati kemaluan si Choi berdiri. Keesokkan hari, mama dia terlihat seluar dalam (PW1) di lantai. Itulah yang terakhir.

PW3 added that PW1 ran out of her mother's bedroom.

[53] In respect of PW4's testimony, she said that after PW1 told PW3 about the "kejadian-kejadian," she had asked PW1 as to what had happened. PW4 testified: "(PW1) tiada memberitahu bilakah tarikh berlaku tetapi saya ada bertanya dengan (PW1) apa yang dia cari dalam bilik hari itu. Dia cuma beritahu tiada. Tapi keesokkan paginya, saya terjumpa seluar dalam (PW1) di lantai."

[54] When giving further evidence-in-chief, PW4 said that she remembered the date 27 June 2021 "sebab selepas dua minggu dari tarikh 27 Jun 2021, (PW1) bertanya adakah Choi akan balik lagi jadi saya tengok rakaman CCTV pada 27 Jun 2021." She explained that the CCTV recording showed: "Pada masa itu, kami sedang bermain judi di ruang tamu, pada masa itu, saya ada masuk bilik juga dan buka selimut saya nampak kemaluan Choi sedang bangun masa itu dan (PW1) disebelah dia. Jadi saya bertanya kenapa dengan kemaluan kamu dia jawab saya mahu kencing tapi selepas habis tengok phone dia, dia baru mahu pergi." She said that there were three of them in her bedroom, *viz*, the appellant, PW1 and her sister. See NOP, p. 60.

[55] Assuming what PW3 and PW4 had to say is true, the strands of evidence that some members of the family were gambling in the living room, PW1 ran out of PW4's bedroom, or her underwear was on the floor the next day, do not mean that the alleged act of the appellant in inserting his finger in PW1's vagina on 27 June 2021 has been proved beyond reasonable doubt.

[56] In fact, PW1 (the only person with personal knowledge) did not give evidence that she had been violated by the appellant in that manner, or that she had run out of the room or left her underwear on the floor on that particular night following such an incident.

[57] Learned DPP argued that the date is not an ingredient of the charge. In support, she cited *Mohd Hanif Kassim v. PP And Another Appeal* [2015] 3 CLJ 984, where it was held by Choo Kah Sing JC (now JCA):

> A badly drafted charge deprives an accused of his fundamental right to raise or prepare his defence. This is more so when the exact time or date and place are essential ingredients of the offence charged. However, in cases where the time, date or place does not constitute an essential ingredient of the offence, mere non-compliance with s. 153 of the CPC on the time, date or place will not vitiate the validity of the charge. As long as the general particulars of the time, date or place are stated in the charge and the exercise of an accused's fundamental right to defend his case is not prejudiced or derogated, the charge remains a valid charge.

[58] His Lordship went on to hold:

> The ingredients for the offence the accused was charged with in the instant case are: (i) there must be sexual intercourse between a man and a woman; penetration is sufficient to constitute sexual intercourse; and (ii) that the victim is under the age of sixteen years of age when the alleged offence was committed. The exact time or date in the offence charged is not an essential ingredient in order to find conviction against the accused. However, it is to be noted that if the age of the victim at the time or date of the commission of the offence is in question, then it would be relevant to state the exact time or date of the offence was alleged to have committed.

[59] In that case, the respondent/accused was charged with raping the victim, who was under 16 years of age, between 20 to 28 June 2010, at between 2 to 4am. The victim was impregnated and went on to conceive.

[60] A DNA test established the respondent/accused's paternity.

[61] The respondent/accused denied having been to the place of the incident and professed not to know the date on which he was said to have raped the victim. He also contended that the science officer was not a qualified person to prepare the DNA profiling report. Justice Choo found no merit in those arguments, and reversed the decision of the Sessions Court.

[62] The material facts in that case are markedly different. The act of sexual intercourse could hardly be denied. Here, the appellant's act of inserting his finger in PW1's vagina on 27 June 2021 was challenged, through the argument that PW1 stayed and slept in PW3's bedroom and could not have been in PW4's bedroom at the material time, more so as there was conflicting evidence as to the location or bedroom where the offence was committed. The appellant also took the position that he was helping PW4 with the birth of the puppies at the material time.

[63] On a related note, going by the charge, the point is that the appellant was not obliged to answer other allegations on another date. There was no "on or about" or any other form of leeway in the charge allowed. He would be prejudiced if latitude were to be given to the precise date stated in the charge.

[64] In *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, the Federal Court considered the date of the offence of sodomy as an essential part of the charge. The majority held as follows:

> In the instant appeals, it is not that the offences have been proved to have been committed on another day, not being the date stated in the charge. The question of amending the charges does not arise. It is simply a question whether the alleged offences have to be proved to have been committed as per charge, including the date. As has been pointed out, the Federal Court in the two cases referred to earlier did not address its mind to the provision of s. 153(1) of the Criminal Procedure Code. Perhaps that was because it was only dealing with the question whether the charges should have been amended. In the instant appeals we are dealing with the question whether, the offences not having been proved to have been committed on another date, it must be proved to have been committed on the date stated in the charges. Section 153(1) of the Criminal Procedure Code clearly states that "The charge shall contain such particulars as to the time ..." Since it is mandatory to state the "time" (*ie*, date or period) when an offence is alleged to have been committed, clearly it is a "material matter" and an "essential part of the alleged offence", to use the words of Atkin J in the exception stated by him, even

if that case is applied. If the law clearly provides that the charge shall contain particulars as to "time", it follows that such particulars must be proved.

[65] Now, there were other allegations of sexual misconduct against the appellant, which were made in relation to PW1. Although the evidence was not objected to, the learned SCJ did not carry out a balancing exercise to ascertain whether the probative value outweighed the prejudicial value. The omission is perhaps understandable as the evidence would go towards showing *mens rea*, that the act complained of was sexual in nature. Be that as it may, the balancing exercise which must be carried out, was not undertaken in the Sessions Court.

[66] In *Junaidi Abdullah v. PP* [1993] 4 CLJ 201; [1993] 3 MLJ 217, the Supreme Court held:

> On the principle laid down in *Makin*'s case 6 and *Boardman*'s case 12, we are of the opinion that where the purpose of adducing evidence of similar facts or similar offences is justifiable on the ground of relevancy and necessity to rebut any defence which would otherwise be open to the accused (in addition to those under ss. 14 and 15 of the Evidence Act 1950), it is admissible in evidence provided the probative value of such evidence outweighs its prejudicial value.

[67] On the back of this apex court authority, Collin Sequerah JC (now JCA), in *PP v. Wong Chee Beng* [2016] CLJU 876; [2016] 1 LNS 876; [2016] MLJU 1227, held:

> Therefore it is clear that even in those cases falling under sections 11, 14 and 15 of the Evidence Act 1950, the test of relevancy is whether the probative value of such evidence outweighs its prejudicial value. *The court is thus not immunised from having to carry out a balancing exercise on this aspect*. This was made clear in the Court of Appeal case of *Azahan Mohd Aminallah v Public Prosecutor* [2005] 1 CLJ 374 which held:
>
> > A court when deciding whether to admit similar fact evidence must carry out a balancing exercise by weighing the probative value of such evidence against its prejudicial effect as impliedly required by ss. 14 and 15 of the evidence Act 1950. The court would be justified in admitting the evidence where [its probative value is outweighed by its prejudicial effect.] See, *Boardman v. Director of Public Prosecutions* [1975] 3 AC 421; *Director of Public Prosecutions v. P* [1991] 2 AC 447; *Junaidi Abdullah v. PP* [1993] 4 CLJ 201; [1993] 3 MLJ 217; *Public Prosecutor v. Teo Ai Nee* [1995] 2 SLR 69; *Tan Meng Jee v. Public Prosecutor* [1996] 2 SLR 422; *Lee Kwang Peng v. Public Prosecutor* [1997] 3 SLR 278.
>
> > In *Tan Meng Jee v. Public Prosecutor* Yong Pung How CJ when delivering the judgment of the Singapore Court of Appeal said of the equipollent provisions in the Singapore evidence Act:

> Be that as it may, we are of the opinion that the admission of similar fact evidence, at least for the purposes identified in ss. 14 and 15 of the Evidence Act, should be governed by the balancing test adopted by the House of Lords in *Boardman*'s case. Such an approach is warranted both in principle as well as on the wording of the legislation itself. As to the former, it has been argued above that the rationale of the rule excluding similar fact evidence is so that every person charged with an offence may only be convicted upon being proved to have committed the acts within the charge. It would be subverting established jurisprudence to allow a conviction based on the particular disposition of the accused - based on the contention that the accused is that type of person who would commit such an offence. On the other hand, there may be cases where the interest of justice clearly outweigh any prejudicial dangers inherent in the evidence.
>
> (emphasis added)

[68] In *Mohd Faiz Ismail v. PP* [2022] CLJU 3146; [2022] 1 LNS 3146, Celestina Stuel Galid J went further and held that a statement by the Magistrate in the grounds of judgment that "the probative value of the evidence given as to the series of the accused's act outweigh the prejudicial effect against the accused because the accused was a teacher and was in the position of authority to pressurise PW3" was insufficient. It was held that the issue of admissibility should have been dealt with immediately, and not just in the grounds of judgment.

[69] On any view, the balancing exercise was not carried out by the Sessions Court in the present case; a *fortiori*, the prejudice accruing to the appellant here was stronger as the CCTV recording which PW4 relied upon to give a date to the commission of the offence was not properly investigated by PW5 as there was no evidence he had even viewed it.

[70] Further, the CCTV recording itself was not produced at the trial. Thus, even though PW5 had gathered statements from the other prosecution witnesses, obtained the medical report (P4) and examination report (P5) from PW2, visited the scene of the incident and made a sketch plan, and so on, PW5 did not investigate the alleged CCTV recording or secure a copy for the trial.

[71] The consequences have been made clear in *Rahmani Ali Mohamad v. PP* [2014] 7 CLJ 405, where the Court of Appeal held:

> In our judgment, the appellant's right to a fair trial has been compromised as a result of the failure of PW8 to carry out investigation to verify the appellant's version of fact. The appellant may thereby have lost a chance which was fairly opened to him of being acquitted and that there had been occasioned a failure or a miscarriage of justice (see: *Mraz v. The Queen* [1955] 93 CLR 493 quoted with approval in *Lim Hock Boon v. PP* [2007] 4 CLJ 114; [2007] 1 MLJ 46).

[72] Even if the CCTV recording were produced and it showed PW1 running out of PW4's bedroom on 27 June 2021, and her underwear (which did not have any bloodstain) was found on the floor the next day, that does not mean the appellant had inserted his finger into her vagina at the material time.

[73] There are fatal gaps in the prosecution's case.

[74] It is a quantum leap to say that the appellant must have inserted his finger in PW1's vagina, only because PW3 says PW1 ran out of the room hastily on a particular night (the date of which was not proved) or that PW4 saw – in her bedroom – the appellant in an aroused state with PW1 and her sister, and PW1's underwear was found on the floor the next day. It could be any other act, sexual or otherwise in nature. It could be that the appellant was aroused at that time because he felt an urge to empty his bladder, as he explained to PW4.

[75] The outcome at the end of a criminal case depends not on the weakness of the defence, but on the ability of the prosecution to prove its case as set out in the charge beyond reasonable doubt. This court finds it necessary to hearken to *Mohan Singh Lachman Singh v. PP* [2002] 3 CLJ 293; [2002] 3 MLJ 291, where Gopal Sri Ram JCA (as he then was) held:

> The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi v PP* [1985] 2 MLJ 16. That has always been the law. It is still the law.

Conclusion

[76] It is well-established that a court in an appellate capacity will be slow to disturb the decision of a trial judge. It will only do so when, as held by Zawawi Salleh JCA (as he then was) in *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

A (f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned.

B **[77]** The conviction is unsafe as the infirmities of the case fall squarely into those categories. The learned SCJ had allowed evidence of various acts committed on various dates to be commingled with the specific act set out in the charge, without carrying out the requisite balancing exercise of evaluating whether the evidence of similar and other acts of a sexual nature C ought to be admitted by considering the probative value against the prejudicial aspects.

[78] An accused is only required to answer the specifics in the charge laid against him, for he may well have an explanation or defence in relation to acts which do not form part of the charge.

D **[79]** There is also the incomplete investigation by PW5, which assumes greater significance, when one considers that PW3 and PW4's testimony originated from PW1, who did not know the date when the alleged offence was said to have been committed. That is not to say that PW1 was not telling the truth.

E **[80]** Ultimately, there were gaps in the prosecution's case which were not filled. In particular, evidence of the specific act on the date in question was found to be wanting, and could not be linked to the specific date in the charge.

F **[81]** At the hearing of the appeal on 27 November 2024, the court asked the prosecution/respondent whether it could identify any evidence to show that the appellant had engaged in the act of inserting his finger into PW1's vagina on 27 June 2021, shortly before (i) PW1 ran out of PW4's bedroom, or (ii) the occasion when PW4 saw the appellant in an aroused state with G PW1 and her sister in the same bedroom – more so when the sister was not called as a witness. Learned DPP, with typical candour, acknowledged that there was no such evidence.

[82] The confluence of these factors meant that the conviction is unsafe.

[83] For the reasons given, the appeal was allowed.

H **[84]** The conviction and sentence were set aside. The appellant was acquitted and discharged.

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